

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)
)
 Plaintiff,)
)
v.) **Case No. 05-cv-329-GKF(PJC)**
)
TYSON FOODS, INC., et al.,)
)
 Defendants.)

**STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO
"DEFENDANTS' MOTION TO EXTEND THE APRIL 16 DISCOVERY
DEADLINE FOR CERTAIN SPECIFIED DEPOSITIONS" [DKT #1946]**

Plaintiff, the State of Oklahoma ("the State"), respectfully responds in opposition to "Defendants' Motion to Extend the April 16 Discovery Deadline for Certain Specified Depositions" [DKT #1946] ("Motion"). Defendants' Motion should be denied except as with respect to the deposition of David Payne, the State's expert on Defendants' financial net worth.

Defendants have not been diligent in conducting deposition discovery in an orderly, timely manner. Not only have they waited until the final month and a half of discovery to attempt to take scores of depositions -- a significant number of which are depositions of persons who were listed on the State's original Rule 26(a) disclosure made nearly three years ago¹ -- but also they have failed to depose the State's damages experts despite having had their reports since January 5, 2009. Defendants are now asserting that they do not have time to complete their deposition discovery before the April 16, 2009 discovery deadline. This is a discovery crunch of Defendants' own making.

¹ Defendants complain that the State's final fact witness list identified 348 witnesses. In contrast, the final fact witness lists served by Defendants identified more than 1,400 witnesses.

In fact, the Court should understand that Defendants are doing more than asking to conduct a discrete number of depositions after the present discovery cutoff; they are proposing to move a number of depositions *that are currently scheduled or that could be scheduled before the close of discovery* until after the close of discovery.² Defendants' lack of diligence in deposition discovery does not constitute a valid basis to extend the discovery deadline. Defendants' Motion should be denied.

1. The State's Response Cost Rule 30(b)(6) Designees

Defendants have known since the case was filed in June 2005 that the State was seeking response costs. *See, e.g.*, DKT #1215 (Second Amended Complaint, ¶¶ 69-76). Discovery has been on-going since April 2006. Defendants had ample opportunity to depose the State on response costs these past three years. Yet it is only at the eleventh hour of discovery that Defendants saw fit to notice a Rule 30(b)(6) deposition of the State on response costs.³ The State has offered a Rule 30(b)(6) deposition of the State regarding response costs for April 15-16, 2009, which Defendants have accepted. *See* Ex. 1. Thus, this discovery can be completed

² Defendants make mention of five depositions that the two sides have agreed to seek leave to conduct beyond the April 16, 2009 discovery cut-off. The facts concerning these depositions are different. The need to take three of these individuals is occasioned by Judge Joyner's August 8, 2008 Order extending the expert disclosure deadline for Defendants' expert reports addressing Spring 2009 sampling until May 30, 2009, thereby making it impossible to depose them prior to the April 16, 2009 discovery deadline. The fourth individual is of a non-testifying plaintiff expert, Dr. Jack Jones, who Defendants have sought to depose prior to the discovery deadline, but Dr. Jones' schedule did not permit a deposition until May 19, 2009. Similarly, the schedule of Dr. Dwayne Edwards, a non-party witness subpoenaed by the State originally for a deposition on February 19, 2009, could not accommodate a deposition prior to the discovery deadline.

³ Defendants also want a total of eleven fact witness depositions (noticed for after the April 16 discovery deadline) on the issue of response costs, a request that is wholly unnecessary in light of the State's agreement to provide designees in response to the Rule 30(b)(6) notice.

within the discovery deadline, and Defendants request for an extension to take depositions on the State's response costs is moot.

2. The State's Damages Experts

The State disclosed its natural resource damages experts on January 5, 2009. Since that time, it has offered deposition dates for the experts who authored the natural resource damages reports on multiple occasions. On February 3, 2009, the State offered its *first* set of deposition dates for its natural resource damages experts.⁴ See Ex. 2. Defendants did not accept any of these deposition dates. On March 11, 2009, in response to a March 10, 2009 request from Defendants for a new set dates before March 30, 2009, the State offered its *second* set of deposition dates for its natural resource damages experts.⁵ See Ex. 3. Two days later, on March 13, 2009, Defendants changed their position, stating that they were no longer interested in the deposition dates prior to March 30, 2009; rather, they proposed taking the depositions during the first two weeks in April. See Ex. 4. Accordingly, on March 19, 2009, the State offered its *third* set of deposition dates for its natural resource damages experts.⁶ See Ex. 5. Defendants then requested alternative dates for Mr. Chapman and Dr. Krosnick. The State did its best to accommodate Defendants' request, and on March 20, 2009, offered an alternative date for Mr. Chapman, which in turn necessitated that the State offer an alternative date for Dr. Bishop of

⁴ The dates were as follows: David Chapman (Feb. 20 or 23), Michael Hanemann (Feb. 25, 26, or 27), Richard Bishop (Feb. 24 or 25), Roger Tourangeau (Feb. 26), Edward Morey (Feb. 27), Jon Krosnick (Feb. 28 or March 2), and Barbara Kanninen (Mar. 2).

⁵ The dates were as follows: David Chapman (Mar. 18), Edward Morey (Mar. 20), Richard Bishop (Mar. 23), Roger Tourangeau (Mar. 25), Barbara Kanninen (Mar. 26), Jon Krosnick (Mar. 27), and Michael Hanemann (Mar. 29).

⁶ The dates were as follows: David Chapman (Mar. 31), Richard Bishop (Apr. 6), Roger Tourangeau (Apr. 8), Michael Hanemann (Apr. 10), Edward Morey (Apr. 15), Barbara Kanninen (Apr. 16), and Jon Krosnick (Mar. 27).

April 11, 2009. *See* Ex. 6. The State also explained that Dr. Krosnick's only remaining availability during the discovery period was March 27, 2009, and strongly encouraged Defendants to proceed with his deposition on that date. However, Defendants rejected that proposal. On March 23, 2009, Defendants accepted the dates for five of the State's natural resource damages experts, but rejected the new date proposed for the deposition of Dr. Bishop, claiming they could accommodate any work day between April 1 and April 16 for Dr. Bishop's deposition. *See* Ex. 7. On March 24, the State offered April 14, 2009. *See* Ex. 8. As of today, Defendants have ignored this offer despite requests from the State for a response.

Had Defendants simply taken the depositions of the State's natural resource damages experts in February or March instead of waiting until the very end of discovery, they would not find themselves in this predicament. Deposition dates for all of the State's natural resource damages experts (except for Dr. Krosnick who due to scheduling conflicts no longer has any free dates available prior to April 16, 2009) have still been made available prior to the discovery deadline. Thus, there is no reason for an extension.

Similarly, the State disclosed Mr. Payne -- the State's expert witness on Defendants' financial condition -- on January 5, 2009. Although Defendants could have asked for a date for Mr. Payne's deposition in January or February, they waited until less than a month prior to the discovery deadline to do so. Mr. Payne's schedule allowed only for an April 16 deposition. Contrary to Defendants' representation to the Court regarding the State's alleged refusal to provide a second day for Mr. Payne's deposition, the State had in fact agreed to provide a second day to continue and complete the deposition, but merely had not had the opportunity to provide the second day prior to the filing of the instant motion. *See* Ex. 9. Had counsel met and conferred with the State prior to filing their Motion (as was their obligation under the Local

Rules), an agreement could have been worked out. All that said, the State is agreeable, should the Court provide its consent, to allowing Defendants to take the deposition of Mr. Payne on either April 27-28 or April 28-29. The State is agreeable, in part, because Defendants have yet to comply with the Court's March 13 Order, which "directs that each Defendant produce the balance sheet from its last audited financial statement and its most current balance sheet." *See* DKT #1920. Although the Cargill Defendants have asserted to the State that they are in compliance with the March 13 Order, no supplementations have been made and the State maintains (as it did in its previous Motion and in argument) that its previous production was not complete. No other Defendant has provided any information regarding its intention to comply with the Court's March 13 Order.

3. Quang Pham

Quang Pham was included on the State's Rule 26(a) disclosure made some three years ago. Defendants listed Quang Pham as a witness on their February 19, 2009 final witness list.⁷ On March 19, 2009, Defendants noticed the deposition of Mr. Pham for April 13, 2009. Mr. Pham is out of the country, thus making his deposition prior to the discovery cut-off impossible. Under normal circumstances this fact might warrant allowing Mr. Pham's deposition to be taken beyond the discovery deadline. However, discovery has been going on *for nearly three years*. If Mr. Pham is such an important witness to them, Defendants should have attempted to take his deposition at some point earlier in discovery, rather than waiting until the eleventh hour.

⁷ The State also listed Mr. Pham on its final witness list, but it subsequently has informed Defendants that it does not intend to call Mr. Pham at trial.

4. The State's Deposition of the U.S. Poultry & Egg Association

On April 2, 2009, Defendants withdrew this portion of their Motion. *See* DKT #1954. The Rule 30(b)(6) deposition of the U.S. Poultry & Egg Association has been set for April 16, 2009 -- within the discovery deadline.⁸

5. The Cargill Defendants' Proposed Rule 30(b)(6) Deposition of the State

The Cargill Defendants noticed a Rule 30(b)(6) deposition of the State for April 3 and 6, 2009. This notice was contrary to the prior agreement to consolidate Rule 30(b)(6) depositions, to meet and confer regarding Rule 30(b)(6) depositions, and, moreover, overlapped a number of areas in which there has already been significant discovery. As such, the State moved for protective order. *See* DKT #1933. In the event the Court denies the State's motion for a protective order, the State has agreed to produce its designees by April 13, 2009, for a single day, 7-hour deposition as provided for in the Rules. *See* DKT #1933. Consequently, no extension of the discovery period will be necessary for a Rule 30(b)(6) deposition in either event.

* * *

Defendants are unnecessarily seeking to extend discovery in this case. Following their unsuccessful effort to read this Court's March 24, 2009 Order granting the State an additional 29 days to conduct discovery of Defendants' damages experts into a more generalized discovery

⁸ For the record, the commentary accompanying Defendants' withdrawal of this portion of their Motion does not present a complete picture of the facts. On March 11, 2009, the State issued a subpoena for a Rule 30(b)(6) deposition of the U.S. Poultry & Egg Association. The response date for the subpoena was April 2, 2009. On March 26, 2009, the U.S. Poultry & Egg Association advised the State that its Rule 30(b)(6) designee could not be available on April 2, 2009, but could be available on April 3, 2009. The following morning, on March 27, 2009, the State advised Defendants about the change in date necessitated by the availability of the designee. Defendants, despite being aware of the subpoena since March 11, 2009, sat silent from March 11 to March 28, offering no input and expressing no interest in this deposition. At the eleventh hour, they sought to reschedule this deposition at their convenience, after the close of discovery. The State has agreed to move the deposition to April 16, 2009, the only alternative date within the discovery period that the deponent is available.

extension, *see* DKT #1942, Defendants filed this Motion. However, "[a]ll good things, including discovery, must come to an end." *United States v. Taylor-Vick*, 513 F.3d 228, 233 (5th Cir. 2008); *see also CarboMedics, Inc. v. ATS Medical, Inc.*, 2008 U.S. Dist. LEXIS 106636, *30 (D. Minn. April 16, 2008) ("Discovery must end sometime; this time has come"). The parties need to begin to turn their attention to pretrial preparations. Indeed, Defendants have already filed two (unfounded) motions for summary judgment, and more are certain to follow. Continued unagreed-to discovery is an unnecessary distraction and unfairly prejudices the State. As this Court stated in its May 15, 2008 Order, DKT #1706, "the court has admonished all parties that extensions of the scheduling order would be rarely granted, and only upon unforeseeable good cause."

Conclusion

WHEREFORE, in light of the foregoing, Defendants' Motion should be denied as set forth herein.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
ATTORNEY GENERAL
Kelly H. Burch OBA #17067
J. Trevor Hammons OBA #20234
Daniel P. Lennington OBA #21577
ASSISTANT ATTORNEYS GENERAL
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

/s/Robert A. Nance

M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
David P. Page OBA #6852
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Louis W. Bullock OBA #1305
Robert M. Blakemore OBA 18656
BULLOCK, BULLOCK & BLAKEMORE
110 West Seventh Street Suite 707
Tulsa OK 74119
(918) 584-2001

Frederick C. Baker
(admitted *pro hac vice*)
Lee M. Heath
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice*)
MOTLEY RICE, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Jonathan D. Orent
(admitted *pro hac vice*)
Michael G. Rousseau
(admitted *pro hac vice*)
Fidelma L. Fitzpatrick
(admitted *pro hac vice*)
MOTLEY RICE, LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	fc_docket@oag.state.ok.us
Kelly H. Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Daniel P. Lennington, Assistant Attorney General	daniel.lennington@oag.ok.gov

M. David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert A. Nance	rnance@riggsabney.com
D. Sharon Gentry	sgentry@riggsabney.com
David P. Page	dpage@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS	

Louis Werner Bullock	lbullock@bullock-blakemore.com
Robert M. Blakemore	bblakemore@bullock-blakemore.com
BULLOCK, BULLOCK & BLAKEMORE	

Frederick C. Baker	fbaker@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth C. Ward	lward@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Michael G. Rousseau	mrousseau@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com

MOTLEY RICE, LLC
Counsel for State of Oklahoma

Robert P. Redemann rredemann@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.

David C. Senger david@cgmlawok.com

Robert E Sanders rsanders@youngwilliams.com
Edwin Stephen Williams steve.williams@youngwilliams.com

YOUNG WILLIAMS P.A.
Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.

John H. Tucker jtucker@rhodesokla.com
Theresa Noble Hill thill@rhodesokla.com
Colin Hampton Tucker ctucker@rhodesokla.com
Leslie Jane Southerland ljsoutherland@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

Terry Wayen West terry@thewestlawfirm.com
THE WEST LAW FIRM

Delmar R. Ehrich dehrich@faegre.com
Bruce Jones bjones@faegre.com
Krisann C. Kleibacker Lee kkleee@faegre.com
Todd P. Walker twalker@faegre.com
Christopher H. Dolan cdolan@faegre.com
Melissa C. Collins mcollins@faegre.com
FAEGRE & BENSON, LLP

Dara D. Mann dmann@mckennalong.com
MCKENNA, LONG & ALDRIDGE LLP
Counsel for Cargill, Inc. & Cargill Turkey Production, LLC

James Martin Graves jgraves@bassettlawfirm.com
Gary V Weeks gweeks@bassettlawfirm.com
Woody Bassett wbassett@bassettlawfirm.com
K. C. Dupps Tucker kctucker@bassettlawfirm.com
BASSETT LAW FIRM

George W. Owens gwo@owenslawfirmnpc.com
Randall E. Rose rer@owenslawfirmnpc.com
OWENS LAW FIRM, P.C.

Counsel for George's Inc. & George's Farms, Inc.

A. Scott McDaniel	smcdaniel@mhla-law.com
Nicole Longwell	nlongwell@mhla-law.com
Philip Hixon	phixon@mhla-law.com
Craig A. Merkes	cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC	

Sherry P. Bartley	sbartley@mwsqw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC	

Counsel for Peterson Farms, Inc.

John Elrod	jelrod@cwlaw.com
Vicki Bronson	vbronson@cwlaw.com
P. Joshua Wisley	jwisley@cwlaw.com
Bruce W. Freeman	bfreeman@cwlaw.com
D. Richard Funk	rfunk@cwlaw.com
CONNER & WINTERS, LLP	

Counsel for Simmons Foods, Inc.

Stephen L. Jantzen	sjantzen@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
RYAN, WHALEY, COLDIRON & SHANDY, P.C.	

Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Thomas C. Green	tcgreen@sidley.com
Gordon D. Todd	gtodd@sidley.com
SIDLEY, AUSTIN, BROWN & WOOD LLP	

Robert W. George	robert.george@tyson.com
L. Bryan Burns	bryan.burns@tyson.com
TYSON FOODS, INC	

Michael R. Bond	michael.bond@kutakrock.com
Erin W. Thompson	erin.thompson@kutakrock.com
Dustin R. Darst	dustin.darst@kutakrock.com
KUTAK ROCK, LLP	

Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.

R. Thomas Lay
KERR, IRVINE, RHODES & ABLES
Frank M. Evans, III
Jennifer Stockton Griffin
David Gregory Brown
LATHROP & GAGE LC
Counsel for Willow Brook Foods, Inc.

rtl@kiralaw.com
fevans@lathropgage.com
jgriffin@lathropgage.com

Robin S Conrad
NATIONAL CHAMBER LITIGATION CENTER

rconrad@uschamber.com

Gary S Chilton
HOLLADAY, CHILTON AND DEGIUSTI, PLLC
Counsel for US Chamber of Commerce and American Tort Reform Association

gchilton@hcdattorneys.com

D. Kenyon Williams, Jr.
Michael D. Graves
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON
Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.

kwilliams@hallestill.com
mgraves@hallestill.com

Richard Ford
LeAnne Burnett
CROWE & DUNLEVY
Counsel for Oklahoma Farm Bureau, Inc.

richard.ford@crowedunlevy.com
leanne.burnett@crowedunlevy.com

Kendra Akin Jones, Assistant Attorney General
Charles L. Moulton, Sr Assistant Attorney General
Counsel for State of Arkansas and Arkansas National Resources Commission

Kendra.Jones@arkansasag.gov
Charles.Moulton@arkansasag.gov

Mark Richard Mullins
MCAFEE & TAFT
Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen

richard.mullins@mcafeetaft.com

Mia Vahlberg
GABLE GOTWALS

mvahlberg@gablelaw.com

James T. Banks
Adam J. Siegel
HOGAN & HARTSON, LLP

jtbanks@hhlaw.com
ajsiegel@hhlaw.com

Counsel for National Chicken Council; U.S. Poultry and Egg Association & National Turkey Federation

John D. Russell
FELLERS, SNIDER, BLANKENSHIP, BAILEY
& TIPPENS, PC

jrussell@fellerssnider.com

William A. Waddell, Jr.
David E. Choate
FRIDAY, ELDREDGE & CLARK, LLP

waddell@fec.net
dchoate@fec.net

Counsel for Arkansas Farm Bureau Federation

Barry Greg Reynolds
Jessica E. Rainey
TITUS, HILLIS, REYNOLDS, LOVE,
DICKMAN & MCCALMON

reynolds@titushillis.com
jraine@titushillis.com

Nikaa Baugh Jordan
William S. Cox, III
LIGHTFOOT, FRANKLIN & WHITE, LLC

njordan@lightfootlaw.com
wcox@lightfootlaw.com

Counsel for American Farm Bureau and National Cattlemen's Beef Association

Also on this 2nd day of April, 2009 I mailed a copy of the above and foregoing pleading to:

David Gregory Brown
Lathrop & Gage LC
314 E HIGH ST
JEFFERSON CITY, MO 65101

Thomas C Green
Sidley Austin Brown & Wood LLP
1501 K ST NW
WASHINGTON, DC 20005

Dustin McDaniel
Justin Allen
Office of the Attorney General (Little Rock)
323 Center St, Ste 200
Little Rock, AR 72201-2610

Steven B. Randall

58185 County Road 658
Kansas, Ok 74347

Cary Silverman

Victor E Schwartz

Shook Hardy & Bacon LLP (Washington DC)
600 14TH ST NW STE 800
WASHINGTON, DC 20005-2004

George R. Stubblefield

HC 66, Box 19-12
Proctor, Ok 74457

J.D. Strong

Secretary of the Environment
State of Oklahoma
3800 NORTH CLASSEN
OKLAHOMA CITY, OK 73118

/s/Robert A. Nance

Robert A. Nance